

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF PUBLIC UTILITIES

Petition for Investigation and Complaint of)
Gaslantic Corporation pursuant to G. L.)
c. 164, Sections 76 and 94 against)
Fall River Gas Company Regarding the)
Assessment and Collection of Transportation) DPU 96-101
Rates Contrary to the Filed Tariff)
and Applicable Requirements of Law)

PETITION FOR INVESTIGATION AND COMPLAINT

Pursuant to G.L., c. 164, sections 76 and 94, and 220 C.M.R. 1.04, Gaslantic Corporation ("Petitioner") hereby complains of, and petitions the Department of Public Utilities (the "Department") for an investigation into, the assessment and collection of transportation rates and charges by Fall River Gas Company (the "Company") contrary to the then applicable provisions of its transportation tariff.

The Company has fashioned out of whole cloth, and steadfastly insists that it possesses, a "put" on its transportation customers for "no-notice" untariffed back-up sales service, priced at unduly punitive rates. Under the "put", it is the Company's option, not the transportation customer's, to supply back-up service. Consistent with its punitive pricing, the service is without notice to the customer. The result is illegal as a matter of statutory law, unenforceable as a matter of contract law and unduly punitive under applicable regulatory principles.

The charging of rates unsupported by tariff is illegal as a matter of law. " . . [n]o different rate, price or charge shall be charged, received or collected by [the Company] . . . from those specified in the schedule then in effect ." G.L. c. 164, Section 94.

Section 76 of Chapter 164 provides the Department with general supervisory authority over all gas companies, including the Company, and is particularly applicable to the facts presented hereinbelow. The charging of transportation rates without support in the filed tariffs of an electric or gas company is worthy of investigation and of concern to the Department as it prepares for ever-expanding service options under tariffs newly drafted and filed by such companies which address the "interface" between unregulated competitive suppliers and regulated companies. In fact, the Company here has gone beyond a simple misreading of its existing tariff and has now filed for Department approval a transportation tariff which attempts to codify its misinterpretation, but only succeeds in making matters worse. The pending tariff leaves a gaping "hole" in transportation services because "no-notice" back-up sales service is now unpriced until such time as the Company notifies its transportation customer of the non-delivery of the customer's own supplies.

In trying to close the gap between what its existing tariff plainly said and what the Company wanted it to say, the Company has exacerbated its problem and left a hole in its service options which did not previously exist. The Company has done this by excluding from the definition of balancing service gas sales it may make to a customer between the time that the customer's gas supplier first fails to deliver supplies and the time when the Company gives its customer notice of non-delivery. The pending tariff prices gas supplied to the customer by the Company **after** the Company gives notice of non-delivery and the customer continues to take gas without the Company's authorization. **Before** notice, gas supplied by the Company is in "limbo" - neither balancing service nor firm standby service.

Regulated distribution companies must be put on notice that the Department intends vigorously to police the compliance of such companies with the statutory requirement that only rates in compliance with Section 94 may be charged. Distribution utilities should not be allowed "to make up their tariffs as they go along." The Company is guilty of doing precisely that in this case. Competitive sales providers, such as Petitioner, must know where they stand in order to evaluate their service offerings. They must know that the tariff is "sacred" and will be enforced as written and approved. As the

Department is aware from its many decisions regarding competitively solicited wholesale power agreements, the sanctity of the written contract, and here the written regulatory contract, must be preserved. The "interface" between the competitive and regulated worlds cannot function on any other basis.

Section 94 of Chapter 164 states in pertinent part that

"Gas . . . companies shall file with the department schedules, . . . showing all rates, prices and charges to be thereafter charged or collected within the commonwealth for the sale and distribution of gas . . . , together with all forms of contracts thereafter to be used in connection therewith. Rates, prices and charges in such a schedule may, from time to time, be changed by any such company by filing a schedule setting forth the changes rates, prices and charges, but **until the effective date of any such change no different rate, price or charge shall be charged, received or collected by the company filing such a schedule from those specified in the schedule then in effect;** . . . "

G.L. c. 164, Section 94. (Emphasis added.)

Petitioner respectfully submits that the facts complained of herein show the Company to be in blatant violation of Section 94 by charging penalty fees to a transportation customer of the Company, which had not elected the Company's optional "Firm Standby Service", as if such customer had made such optional election.

The Company has claimed that Petitioner's position "blurs the distinction between balancing and standby/backup service." But, it is the Company's stubborn efforts to "rewrite" by interpretation its own plainly worded tariff which improperly blurs the distinction between its defined balancing service and its defined, and elective, standby sales service. The Company takes non-delivery supply service, which readily fits within the framework of "balancing" as drafted by the Company, and converts that service into "no-notice" untariffed back-up service which the Company can elect to impose on its customers. No such "put" exists in its tariff.

The existing tariff is written to cover the full range of possible service outcomes whenever there is a difference between the customer's receipts at the "city gate", including zero receipts on a scheduled delivery day, and customer usage at the meter. One of the possible outcomes is interruption of service which, along with the potential for balancing penalties, protect the Company and its firm ratepayers. Customers electing not to take the optional back-up service accept this outcome knowingly. When imbalances become severe enough, as could be the case if non-deliveries were large enough and repeated, balancing penalties become appropriately severe. The Company can also exercise its interruption and/or termination rights and customers without back-up would then experience the risk they knowingly accepted.

However, the Company possesses no right to require a customer, at the Company's option, to take back-up service, at back-up penalty prices, when the customer has not elected such service. The Company should have drafted a "put" if it required one and all parties, customers and competitive suppliers would have had adequate notice.

In this case, the Company charged back-up penalty fees, on a "no-notice" basis, notwithstanding the absence of any support in the tariff. Then, in an admission of the impropriety of its earlier action, the Company filed with the Department changes to its tariff in a **failed** attempt to provide for such penalty fees in the circumstances of this case.

Gas transmission is a physical system with, typically, many parties in a delivery chain. As a result, actual receipts at a given point in the chain will always fluctuate and rarely meet exactly scheduled quantities. Daily, monthly and cumulative contract balancing service provisions are designed to deal fairly with this reality. In this case, and typically, these balancing service provisions include scaled penalty thresholds that first have to be exceeded and are then appropriately priced to account for the severity, time and duration of the imbalance condition.

In the continuum of all possible positive and negative balance conditions, the pending tariff succeeds in literally excluding all imbalances at the "city gate" from the definition of balancing service, including the case of zero actual receipts on scheduled delivery days. However, the Company leaves the pricing of any gas supplied by the Company to make up any negative balance at the "city gate" as a gaping hole in its re-designed tariff. Until the Company gives notice to a transportation customer that its gas supplies have not been delivered, the tariff has no pricing provision for the gas supplied by the Company. No doubt, unless stopped by the Department, the Company will revert to its "put" theory of "no-notice" untariffed service at the same penalty prices. Gas companies cannot be allowed to "make things up as they go along". This needs fixing by the Department.

In support of the instant Complaint, Petitioner alleges as follows:

FACTS

1. The Company is a natural gas distribution company subject to regulation by the Department, serving a service territory in the Commonwealth which includes the cities or towns of Fall River, Somerset, Swansea and Westport.
2. During 1992, and in particular during August, 1992, the Company provided natural gas transportation service to facilities whose requirements were 100 MCF/day or greater under tariff rates and tariff terms and conditions filed with and approved by the Department in accordance with Section 94. Such tariffs were Rate G-60, Quasi-Firm Service, M.D.P.U. No. 225-A (Effective November 1, 1991) ("Rate G-60") and Terms and Conditions for Quasi-Firm Service, M.D.P.U. 214-A (Effective November 1, 1991) ("Rate G-60 Terms"). Copies of such tariffs, as in effect in 1992, are attached hereto as Exhibit A.
3. Globe Manufacturing Company is a manufacturing corporation ("Globe") with a place of business in Fall River, Massachusetts (the "Plant"). At the Plant, Globe was a Rate G-60 transportation customer of the Company during 1992 and in particular, during August, 1992.
4. Petitioner is a Delaware corporation with a place of business in Forest Hills, Maryland. Petitioner is engaged in the purchase, sale and transportation in interstate commerce of natural gas supplies, primarily for re-sale to commercial and industrial customers such as Globe. See: Affidavit of John Cory, Exhibit B, attached hereto, Paragraph 1. ("Cory Affidavit").
5. During 1992, and in particular during August, 1992, Globe was a gas sales customer of Petitioner for the natural gas requirements of Globe at the Plant. Pursuant to the sales agreement between Petitioner and Globe, Petitioner advised and assisted Globe with respect to its transportation service from the Company and was responsible for the payment of transportation or imbalance fees or penalties caused by it that were charged to Globe by the Company in connection with the transportation of natural gas supplies to the Plant. Cory Affidavit, Paragraphs 2 and 10.
6. During three days in August, 1992, August 2, August 3 and August 27, Petitioner failed, for reasons outside its control, to cause the delivery of any supplies to the Company's "city gate" Receipt Point for re-delivery by the Company to Globe at the Delivery Point at the Plant. In each case, gas supplies were nominated on behalf of Globe by Petitioner for delivery by "upstream" Transporting Pipelines to the Receipt Point at the "city gate". In each case, the nominated volumes were confirmed and scheduled by the Company and all "upstream" Transporting Pipelines. However, unexpected interruptions on such "upstream" Transporting Pipelines caused a failure of scheduled gas to be delivered for Globe at the Receipt Point on each day in question. On each day of non-delivery, neither Globe or Petitioner had notice from anyone of such non-delivery until after the interruption had passed and actual scheduled deliveries had resumed. Cory Affidavit, Paragraph 5.
7. On all three days when there was a failure to deliver gas on behalf of Globe to the "city gate" Receipt Point of the Company, the Company in its discretion, and without notice to or consultation in advance with Globe, supplied gas to Globe to meet its requirements at the Plant. Cory Affidavit, Paragraph 6.
8. On August 2, 1992, Globe required the highest volume of natural gas supplies of the three "non-delivery" days specified in paragraph 6, above. The volumes metered at the Plant were 1,321 MCF on August 2, 1992; 1,220 MCF on August 3, 1992, and 1,043 MCF on August 27, 1992. All such volumes were supplied by the Company to Globe from the Company's own system supplies.
9. In its bill for transportation service to Globe for August, 1992, the Company charged Globe penalty fees for service on August 2, 1992 equal to \$20,984.09. The Company explicitly calculated its August 2, 1992 fee per MCF as 150% of the sum of (i) the Marginal Cost of gas on August 2, 1992 for the Company's system supply, or \$3.06/MCF, and (ii) the additional charge of \$7.53/MCF. A copy of such August, 1992 bill to Globe is attached hereto as Exhibit C. The latter charge of \$7.53/MCF on August 2, 1992 was the "Firm Standby Service" cost per unit for the "Maximum Daily Standby Volume" in the months May through October set forth in Rate G-60 for "Firm Standby Service (Optional)". Globe was forced to pay the highest possible standby penalty charge, 150% of the reservation fixed costs and 150% of Marginal Costs, for its entire use on August 2, 1992, notwithstanding the fact that gas was abundantly available to the Company at such a time in the summer. The \$20,984.09 charge represented a unit cost of gas of \$15.89/MCF, or a penalty cost of gas equal to 5.19 times the Company's Marginal Cost of \$3.06/MCF. See: pages 5 and 6 of Rate G-60, Exhibit A attached hereto.
10. On the bill for August, 1992, the Company explicitly showed the calculation for the unit price on August 2, 1992 and labelled such calculation as "PER 18C". "PER 18C" is a reference to paragraph 18.C of the Rate G-60 Terms. Paragraph 18 is captioned "Firm Standby Service" in the Rate G-60 Terms. See: pages 12-13 of the Rate G-60 Terms, Exhibit A, attached hereto.
11. In its bill for transportation service to Globe for August, 1992, Exhibit C attached hereto, the Company appropriately charged Globe for services on August 3, 1992, and on August 27, 1992, at a unit rate for the MCF's supplied by the Company on such days equal to its Marginal Cost of \$3.06/MCF. No other unit costs were added in and no percentage multiplier was factored into the calculation for these days.
12. Within thirty days of receipt of the subject bill for August, 1992, both Petitioner and Globe complained to the Company by telephone of the charges for service on the non-delivery days. Globe paid the bill in order to preserve its transportation

service, notwithstanding the fact that its protest of the bill had not been resolved. Cory Affidavit, Paragraphs 9 and 10.

13. Subsequent to August, 1992, Petitioner reimbursed Globe an amount which covered the difference between the penalty fees of \$20,984.09 charged by the Company for service on August 2, 1992 and the amount the Company should have charged Globe for service on August 2, 1992 pursuant to Rate G-60 and the Rate G-60 Terms. Cory Affidavit, Paragraph 10. Such latter amount is calculated as the product of the 1,321 MCF's used on such day and the Marginal Cost set forth above of \$3.06 per MCF, or a total cost of \$4,042.28. The difference between the amount paid by Globe and the proper amount the Company should have charged Globe for service on August 2, 1992 is \$16,941.81.

14. Subsequent to August, 1992, Globe executed an assignment to Petitioner of all of Globe's right and interest in any claim Globe had against the Company that the penalty imposed by the Company in August, 1992, was not properly imposed. Cory Affidavit, Paragraph 10.

15. Representatives of Petitioner continued unsuccessfully to dispute the propriety of the subject bill in late 1992 and early 1993. The Company, through its counsel of record, acknowledged the ongoing dispute by making, on behalf of the Company, a written offer of settlement which was rejected by Petitioner in 1993. Cory Affidavit, Paragraphs 11 and 12.

CLAIMS

THE COMPANY'S FILED TARIFFS IN AUGUST, 1992 REQUIRED THE COLLECTION OF A LOWER CHARGE FOR THE IMBALANCES EXPERIENCED BY ITS CUSTOMER ON THE GIVEN DAYS

16. Rate G-60 clearly provides that an eligible customer may elect Firm Standby Service, but is not required to take such service, and that such election must be made at the time application for transportation service is made. The service is captioned as "Optional". Rate G-60, page 5, Exhibit A. The applicable terms and conditions confirm that a customer may elect to take this optional service at the time of service application and that the election may be for any level of standby service between 50% and 100% of the customer's "Maximum Daily Transportation Quantity". Rate G-60 Terms, Paragraph 18.A, page 12, Exhibit A.

17. Only when a customer electing standby service takes in excess of its elected level of Firm Standby Service is such customer exposed to a

"penalty charge equal to one hundred and fifty percent (150%) of the sum of the Commodity Cost of the Marginal Supply determined on the day upon which such gas was sold, plus the Monthly Firm Standby Service Charge applied to those amounts of gas taken in excess of the affected Customer's elected level of Firm Standby Service."

Rate G-60 Terms, Paragraph 18.C, Exhibit A.

Such a penalty rate is provided for under no other circumstances, other than a customer electing standby service, under Rate G-60 and the Rate G-60 Terms.

18. The definitions of "Imbalance" and "Negative Balance" in the tariffs of the Company applicable to the transportation service used by its customer Globe in August, 1992 contain no limitation which would preclude their application when there is a failure to delivery quantities of gas to the "city gate" Receipt Point of the Company. Rate G-60 Terms, Paragraph 1.O and 1.R, respectively, Page 3, Exhibit A.

19. The Company is not obligated to supply any gas in excess of the amounts received from the Transporting Pipeline for its transportation customers' accounts, *id.*, Paragraph 13.B, but when, in its sole discretion, it chooses to do so, the applicable Rate G-60 Terms clearly spell out the charges it is permitted to collect. "Negative Balances" up to 80% of the customer's MDTQ will be sold to the customer "at a price equal to the Commodity Cost of the Marginal Supply on the Day in which such Negative Balance was incurred . . ." *Id.*, Paragraph 15.A, Page 10. The Company has the right to terminate service to a customer which has elected to face the risk of termination by electing not to take standby service. *Id.*, Paragraph 13.B, Paragraph 13.D and Paragraph 10. If the Company does not terminate service, pricing must comply with the only other tariff option - balancing service.

20. Globe's MDTQ in August, 1992 was 1,800 MCF's. Globe was entitled to pay for any Negative Balance, which did not exceed 80% of 1,800 MCF's or 1,440 MCF's, in any Day that the Company chose to supply such imbalance gas, an amount equal to the Commodity Cost of the Marginal Supply times each MCF of such Negative Balance. On August 2, 1992, the Company elected, without notice to or advance consultation with Globe, to supply 1,321 MCF's of gas and was entitled to charge therefore not more than an aggregate of \$4,042.28.

21. No other provision of the Rate G-60 Terms applied to cause any other or greater penalty or charge to apply to the imbalance gas supplied by the Company to Globe on August 2, 1992.

BILLING GLOBE THE PENALTY APPLICABLE TO STANDBY CUSTOMERS TAKING IN EXCESS OF THEIR ELECTED STANDBY VOLUMES VIOLATES SECTION 94.

22. Globe had not elected to be a Firm Standby Service customer of the Company in August, 1992 and could not be charged penalty charges which, by their plain terms, applied only to such customers. Globe elected to face the risk of interruption and was never informed that it was receiving "no-notice" back-up service at penalty prices because the Company had elected to "put" its supplies to Globe on such basis.
23. Globe's use of the Company's gas supply on August 2, 1992, fell clearly within the then applicable tariff provisions for "Negative Balances" and should have been billed in accordance with the applicable tariff provisions.
24. Charging amounts different than the applicable tariff rates is a clear violation of Section 94.

MATERIAL CHANGES IN WORDING TO THE TARIFF MADE BY THE COMPANY AFTER AUGUST, 1992 (I) CONSTITUTE AN ADMISSION THAT THE PRIOR TARIFF DID NOT SUPPORT THE APPLICATION OF A PENALTY RESERVED FOR FIRM STANDBY SERVICE CUSTOMERS TO GLOBE IN AUGUST, 1992 AND (II) CREATE A "HOLE" IN THE COMPANY'S TARIFF BY LEAVING UNPRICED GAS SUPPLIED BY THE COMPANY PRIOR TO NOTICE OF NON-DELIVERY

25. On May 17, 1996, the Company filed, in connection with its rate case D.P.U. 96-60, revisions to its tariffs in an attempt to expand its ability to collect penalties in circumstances where a transportation customer, which had not elected any Firm Standby Service, experienced a failure by its supplier to deliver any supplies to the "city gate".
26. In its proposed May, 1996 revisions, the Company added the following new language to the end of the definition of "Imbalance":

"The term Imbalance does not apply to a situation in which a Transporting Pipeline, for any reason, does not deliver Gas to the Company's system for use by the Customer at the level of the Nomination for a given Day, after due consideration of Retention Quantities, or does not deliver any Gas to the Company's system for use by the Customer."

See: Exhibit D attached hereto, Paragraph 1.O, Page 3.

The preceding language is an admission that the Company's prior definition of "Imbalance" did apply to non-delivery days.

27. In its proposed May, 1996 revisions, the Company added a new subparagraph E to the provisions of the tariff, paragraph 14, describing "Customer's Balancing Obligation", which provides in part as follows:

"The provisions of these Terms and Conditions relating to Balancing do not apply to a situation where Gas is not delivered to the Receipt Point on Customer's behalf in the amount of the Customer Nomination, after due consideration of Retention Quantities, or where no Gas is delivered to the Receipt Point on Customer's behalf."

See: Exhibit D attached hereto, Paragraph 14.E, Page 13.

The preceding language is an admission that the Company's prior language describing the "balancing" arrangement did apply to non-delivery days.

28. In its proposed May, 1996 revisions, the Company added a new subparagraph I to the provisions of the tariff, paragraph 19, describing "Firm Standby Service", which provides in part as follows:

"A customer shall be solely responsible for its election not to take Firm Standby Service. Without limiting the foregoing, the Company is under no obligation whatsoever to make any sales to any Customer not electing Firm Standby Service. To the extent that a Customer not electing to take Firm Standby Service continues to utilize the Company's system without written authorization from the Company after notice from the Company that its Gas has not been received at the Receipt Point at the level of the Nomination for a given Day (or has not been delivered to the Receipt Point), the Company shall have the right to . . . 3) charge the Customer a penalty price equal to the penalty price specified in Paragraph 19.C of these Terms and Conditions utilizing an assumed elected level of Firm Standby Service of zero (0) and an assumed Standby Year beginning on the most recent anniversary of the commencement date of the applicable Service Agreement."

See: Exhibit D attached hereto, Paragraph 19.I, Page 19.

The preceding language is an attempt, woefully deficient, to extend the Company's right to charge back-up penalty pricing to the circumstances of this case. The attempt fails because now the resulting tariff has a gaping "hole" in the time period between the non-delivery and the notice of non-delivery. The prior tariff had a closed set of service outcomes. All possible events were covered and priced. Balancing service applied unless the Company interrupted balancing service for customers which had elected no standby service. Now, balancing service has been re-defined to exclude non-delivery service by the

Company. Now, the pricing for continued service after notice of non-delivery is clear, although unduly punitive. A gaping "hole" exists because there are no answers to the questions, "What happens before notice is given?" and "How is gas before notice priced?".

29. None of the above-described changes to the applicable tariff existed in August, 1992. All constitute significant and material changes, none of which could be derived as a matter of fair interpretation from the language existing in August, 1992. Accordingly, the Company's actions in attempting to amend the subject tariff must be taken as an admission that the existing tariff, as in effect in August, 1992, did not provide for the treatment of non-deliveries by transportation customers which had not elected standby service as the occasion for the penalty applicable to standby customers taking in excess of the elected standby volumes.

RELIEF REQUESTED

30. Petitioner respectfully requests that the Department:

(A) Order the Company to refund to Petitioner, as assignee of Globe, the amount of \$16,941.81, together with interest from the date of payment to the Company by Globe to the date of refund by the Company to Petitioner;

(B) Based on the Company's blatant disregard of the terms of its own tariffs, order the Company to pay Petitioner's costs of this proceeding;

(C) Commence the investigation of the anti-competitive impact of the proposed tariff revisions cited hereinabove in Paragraphs 26 through 28 on the availability of reasonable transportation in the Company's service territory in general, and in particular, on the potential competitive gas suppliers as the latter decide whether to compete under transportation tariffs which may force them to absorb penalties of the nature proposed;

(D) Commence the investigation of the confiscatory and "tying" effects of the penalty charges in the proposed tariff revisions cited hereinabove in Paragraphs 26 through 28 on the Company's existing and potential transportation customers as the latter decide whether to take or continue transportation service and to purchase standby supplies; and

(E) Order such other relief that the Department may deem

just and reasonable or otherwise appropriate under the circumstances.

Respectfully submitted,

GASLANTIC CORPORATION

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EXHIBIT A

EXHIBIT B

EXHIBIT C

EXHIBIT D